

**State of Michigan
In the Supreme Court
Appeal from the Court of Appeals**

JOAN M. GLASS

Plaintiff-Appellant,

v

Docket No. 126409

**RICHARD A. GOECKEL and
KATHLEEN D. GOECKEL,**

Defendants-Appellees.

APPELLANT'S REPLY BRIEF

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Plaintiff-Appellant Joan M. Glass submits her reply brief in accordance with the provisions of MCR 7.306(C) and MCR 7.212(G).

1. Introduction

Defendants and their supporting amici seek a ruling from this Court which would arguably amount to the biggest giveaway of public property in American history. In a win at all costs mentality, defendants and their amici attempt to expand the Court of Appeals' erroneous decision by torturing the rulings of relevant Michigan and United States Supreme Court cases. Instead of remaining faithful to the essential rulings of the cases, defendants and their amici selectively extract isolated quotes to buttress a flawed legal argument that defies centuries of well-settled law.

2. Defendants' argument is fatally flawed for refusing to acknowledge that the common law of the sea governs Michigan's Great Lakes shores.

The fatal flaw in the position of defendants and their amici is their refusal to even acknowledge, much less discuss, the common law of the sea which governs Michigan's Great Lakes shores. The Supreme Court's seminal ruling in *Illinois Central R Co v State of Illinois*, 146 US 387 (1892), that the common law of the sea applies to the Great Lakes, was adopted in full measure by the Court in *People v Silberwood*, 110 Mich 103, 108 (1896), "as the law of this state." Thirty years later the Court in *Nedtweg v Wallace*, 237 Mich 14, 17 (1926), described the common law of the sea applying to the Great Lakes as having arisen "out of centuries of effort...numerous adjudications, common necessity, and public forethought" as a "rule beyond question" which "prevailed in England long before the American Revolution", was included in the Northwest Ordinance, "passed as the same trust to the state of Michigan at her admission to the Union", and "has not changed in character or purpose and is an inalienable obligation of sovereignty."

In *Hilt v Weber*, 252 Mich 198, 216 (1930), the case which defendants and amici rely on most heavily, the Court again held in no uncertain terms that, in reversing the *Kavanaugh* cases, it was leaving the law of the State exactly as it previously existed – "squarely planted upon the common law . . . of the sea."

Conspicuously absent from all of the briefs of defendants' supporting amici is any mention at all of the Court's most recent case enunciating the public trust doctrine applying to the Great Lakes, *Obrecht v National Gypsum Co*, 361 Mich 399 (1960). For their part, defendants cite *Obrecht* only in passing, in a parenthetical note on p. 27 of their brief. Yet the Court in *Obrecht* re-affirmed its rulings dating back decades, holding that the public's rights to the submerged lands of Lake Huron were paramount to National Gypsum's riparian right of wharfage. In unequivocal terms, the Court held that this Court, like the legislature, is "one of the sworn guardians" of Michigan's duty as trustee of the Great Lakes, and "Long ago we committed ourselves to the universally accepted rules of such trusteeship as announced by the Supreme Court in *Illinois Central*...." *Obrecht* at 412.

While ignoring *Obrecht*, defendants and their amici focus on *Peterman v Dept of Natural Resources*, 446 Mich 177 (1994), which is not a public trust case but an eminent domain case. Nonetheless, the Court in *Peterman* confirmed the well-settled Michigan rule that the limit of the public's right is the ordinary high water mark, while the ownership of fast land above the high water mark is unqualified. *Peterman* at 198. Defendants' supporting amicus Defenders of Property Rights acknowledges that in *Peterman* "Clearly, this Court understood that despite the existence of a navigational servitude, the Petermans' destroyed uplands [fast lands] were not owned in trust by the State, but rather, by the Petermans." (Defenders' brief p. 12)

3. "Submerged lands" and "lands covered by water" in *Illinois Central* mean all lands extending to high-water mark.

In a bold misinterpretation of *Illinois Central*, defendants at p. 9 of their brief characterize this seminal decision as lacking "even a tiny hint or implication, let alone an actual passage, from the majority opinion in that case that supports Plaintiff's claim here." In defendants' view, "All of the land the Supreme Court held the State of Illinois could not convey was submerged." As defendants would thus have it, the ruling in *Illinois Central* that the state cannot abdicate the public trust in Great Lakes lands applies only to lands below low-water mark and thus excludes the shore.

Any doubt that the words “submerged lands” in *Illinois Central* means Great Lakes lands extending to high-water mark and thus including the shore, and that this was the Supreme Court’s meaning in using the words, is resolved by a subsequent Supreme Court case in which the Illinois Central Railroad Company was again a party, and the Lake Michigan waterfront of Chicago was again at issue.

Eight years after its decision in *Illinois Central*, *supra* the Supreme Court in *Illinois Central RR Co v City of Chicago*, 176 US 646 (1900) (“*Illinois Central II*”), ruled on a dispute in which the Chicago police stopped the railroad company from repairing and buttressing its breakwater along Lake Michigan shore land in Chicago, land which the railroad held in fee simple as a riparian owner (176 US at 650-51). Observing that the railroad was seeking to be vested with a power which would enable it to do indirectly what the Court had ruled in *Illinois Central*, *supra* that the State of Illinois could not do directly (176 US at 659), the Court ruled that the railroad’s power under its charter to use all land and streams needed for its operations, and the grant to the railroad of all such lands and “waters” belonging to the *State*, did not include lands covered by the waters of Lake Michigan. In analyzing the terms “lands and waters” in the State’s grant to the railroad, the Court confirmed the principle that an ordinary grant of lands carries with it all pools and ponds, non-navigable rivers, and waters by which the lands may be submerged. However, under the Court’s prior cases, including *Illinois Central*, *supra*, this principle does not apply to a grant of riparian land on the Great Lakes:

But it is equally well settled that, in the absence of any local statute or usage, a grant of lands by the state does not pass title to submerged lands below high-water mark, and that this principle also applies to the Great Lakes.

176 US at 660 (citations omitted) (emphasis added). Thus, in the parlance of the United States Supreme Court in both *Illinois Central* cases, the “submerged lands” of the Great Lakes held in trust for the public by the state unequivocally extend to high-water mark.

Throughout the seminal *Illinois Central* case, the Court uses the words “land covered by waters” synonymously with “submerged lands”, holding in one of its most often-quoted passages that the Great Lakes “are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the state of lands covered by tide waters that is not

equally applicable to . . . lands covered by the fresh waters of these lakes.” 146 US at 435. Just as “submerged lands” mean bottomlands extending to high water mark, so too do “lands covered by . . . waters.” The Supreme Court’s parlance is simply a pithy way of stating the obvious – that while the shores of the Great Lakes between low and high water marks, like the shores of the tidal seas, are not always covered by water, from time to time they are covered with water, and submerged.

In this light, the fallacy of one of defendants’ and SOS’ main lines of argument is revealed. Both briefs repeatedly misinterpret “submerged lands” and “lands covered by water” as used in *Illinois Central* and Michigan Supreme Court decisions following it as meaning lands below low water mark, or lands lying below the edge of the water. Their arguments based on *People v Silberwood*, 110 Mich 103 (1896), offer the most salient example.

SOS, at p. 13 of its brief, cites from *Silberwood* at 107 the often-quoted passage from *Illinois Central* discussed *supra*, i.e., that the same doctrine governing ownership of and sovereignty over lands covered by tide waters applies to lands covered by fresh water in the Great Lakes (emphasis by SOS). From this, SOS concludes with what it is the essence of its misguided public trust argument: “Thus, this Court in *Silberwood* confirmed the public trust doctrine for lands covered by water, and further unanimously confirmed that the riparian’s fee title ended at the low water mark, where the state’s title began.” SOS, and in a similar manner defendants, thus turns the “lands covered by water” language quoted from *Illinois Central* in *Silberwood* on its head – placing the shoreline boundary at low water mark when the language unequivocally places it at high water mark.

When the Court in *Silberwood* adopted the ruling in *Illinois Central* as the law of this State, it squarely placed the boundary between private riparian property and public trust lands at the high water mark. When the Court in *Hilt* reversed the *Kavanaugh* cases, it returned the boundary from the meander line to the high mark, leaving the law governing Michigan’s Great Lakes shores “squarely planted upon the common law . . . of the sea.” *Hilt* at 216.

Illinois Central II not only clarifies that “submerged lands” means all bottomlands up to high-water mark on the Great Lakes, it also emasculates defendants’ quoted observation of the Court in *Lincoln v Davis*, 53 Mich 375, 385 (1884), i.e., that there is “no such proprietary division known

on these waters as high or low watermark.” (defendants’ brief p. 8).

Defendants and amicus Save Our Shorelines (“SOS”) also quote from *People v Warner*, 116 Mich 228 (1898), to the effect that the absence of tides or their trifling effect might make high and low water mark identical (a point which the Court in *Warner* said it did not pass on, 116 Mich at 239). However, as noted by amicus Tip of the Mitt Watershed Counsel, in hindsight it is easy to understand the lack of appreciation in the older cases that the dynamic nature of Great Lakes water levels do indeed establish a high water mark. On the basis of data which did not exist so many decades ago, technology has advanced to the point that today the constantly fluctuating water levels of the Great Lakes are updated twice daily and made available on-line by the Great Lakes Information Network in cooperation with the National Oceanic & Atmospheric Administration (<http://www.great-lakes.net/conditions>).

4. Defendants’ arguments with respect to ignoring *stare decisis*, and any judicial “taking”, are spurious.

Defendants and amici SOS and Michigan Chamber of Commerce et al cite *Bott v Comm’n of Natural Resources*, 415 Mich 45 (1982), for the proposition that this Court should decline any invitation to ignore *stare decisis* in addressing public recreational needs. Plaintiff concedes that the majority of the divided Court in *Bott* declined to adopt the recreational boating test in favor of the existing log flotation test of navigability. Nonetheless, in the dissenting opinion written by Justice Moody just prior to his death, adopted by Justices Williams and Ryan as their own, Justice Moody discusses at length the seminal cases of *Moore v Sanborne*, 2 Mich 519 (1853), and *Collins v Gerhardt*, 237 Mich 38 (1926), which recognized that the public character of Michigan waterways, which are protected by a solemn and perpetual trust, is to be determined by referring to the public’s necessities for use of the waterways.

Moreover, the specter of ignoring *stare decisis* does not stand between this Court and a ruling in plaintiff’s favor. While in *Bott* the defendants sought a broadening of Michigan’s log flotation test, here plaintiff seeks a ruling which is fully supported by state, federal and common law dating back many centuries.

The ruling in *Bott* brings into sharp focus the critical differences between Michigan law governing inland lakes and streams, where riparians own the beds and have exclusive possession to low water mark, and Michigan law governing the Great Lakes, where riparian ownership and exclusive possession stops at the high water mark. The watercourses at issue in *Bott* were so shallow that they held considerably less water than a bathtub (*Bott* at 62-63), while Bott owned all the land surrounding the small lake and creek at issue (*Bott* at 58). In contrast, the Great Lakes are vast inland seas bordered by eight states and Canada, upon which commercial freighters from around the world transport cargo in international commerce. The thousands of miles of Great Lakes shores which border Michigan include “renowned miles of sandy beaches” (*Obrecht* at 417), the likes of which cannot be found on Michigan’s inland waters.

In light of the critical physical and legal differences between the small, single-proprietor inland lake in *Bott* and the vast international waters of the Great Lakes, the argument by amici Michigan Chamber of Commerce et al that the beach lands of the Great Lakes have the same private character as the small, privately-owned waters in *Bott*, crosses the line from zealous advocacy to frivolity. Mr. Bott had his little lake all to himself. Riparian owners on the Great Lakes share these vast inland seas with the world.

Defendants’ attempt to make a case for a “taking” based on the Court’s refusal in *Bott* to judicially expand Michigan’s public trust doctrine governing inland lakes, is spurious. The Court’s concern in *Bott* about avoiding a judicial taking without compensation was based on a proposed expansion of the definition of navigability which might turn small, privately-owned inland waterways into public thoroughways. While such a result would surely raise the issue of a taking based on investment-backed expectations of the purchasers of riparian property on these small inland waterways, riparian owners on the Great Lakes cannot possibly have any reasonable expectation of private ownership or possession of Great Lake lands below high water mark. Both the case law and statutory law of Michigan has set the boundary of riparian ownership and possession on the Great Lakes at the high water mark for many decades.

Amicus Tip of the Mitt Watershed Council traces the legislative history of Section 2 of the Great Lakes Submerged Lands Act (MCL § 324.32502), and the interpretation of the Act by the agency charged with administering it, and concludes that “the riparian property owners along the Great Lakes shoreline have been on at least constructive notice, if not actual notice, of this legal boundary [the high water mark] administratively since 1958 and statutorily since 1968 (brief p. 36). As Tip of the Mitt also shows, by 1960 the Department of Conservation had already effectively resolved over 400 submerged lands cases under the agency’s definition of ordinary high-water mark. That definition, i.e., the “natural line between the upland and the lake bottom land . . . below which the character of the natural soil and vegetation and the profile of the surface of the soil have been affected and worked upon by the waters of the lake at high stages as to make them distinct in character” (Tip of The Mitt Appendix 5, R 299.371(a)), is virtually identical to the ordinary high water mark as defined under the common law of the sea (see plaintiff’s main brief at pp. 32-34).

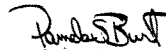
Although no more is needed to show the fallacy of defendants’ taking argument, yet another argument against any reasonable expectation by Great Lakes riparians of ownership below high water mark is that they do not pay property taxes on lands below the high water mark. As established in *Hilt*, the original government surveyors determined the quantity of riparian lands along the Great Lakes by reference to the meander lines. Today, MCL § 54.213(1)(h) dictates that certified survey maps of Great Lakes riparian land are to include “The distance on a boundary or lot line from the point of intersection with a meander line to apparent ordinary high water line of Great Lakes Waters and to the water’s edge of inland lakes and streams.” In turn, MCL § 54.213(3) provides that “if a certified survey map is recorded pursuant to this section, the parcels of land in the map may be described with a supplemental reference to the number of the survey, the volume and page where recorded, and the name of the county, for all purposes, including assessment, taxation, devise, descent, and conveyance.”

5. Conclusion

The Court of Appeals decision runs afoul of the basic principles of the public trust doctrine applying to Michigan's Great Lakes shores under decisions of this Court dating back a full century. Defendants and their supporting amici not only ask this Court to affirm the erroneous decision, they also seek reversal of the one correct ruling in the decision, that the State owns Great Lakes lands below high water mark. Such a ruling by this Court, for which defendants and their supporting amici offer no meritorious support, would arguably amount to the biggest giveaway of public property in American history.

Plaintiff-Appellant Joan M. Glass respectfully asks this Court to reverse the decision of the Court of Appeals and either re-instate the circuit court's ruling or modify it as the Court deems proper; or alternatively vacate or overrule the Court of Appeals decision and remand to circuit court for any necessary further proceedings; and grant such other relief as is proper and just.

Respectfully submitted,



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